Supreme Court, U. S.
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No. 85, Original

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS,
Plaintiff,

VERSUS

STATE OF OKLAHOMA,
Defendant.

MEMORANDUM ON PRIVATE PARTY INTERVENTION IN ORIGINAL JURISDICTION PROCEEDINGS

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PRELIMINARY STATEMENT

The State of Oklahoma has maintained throughout this litigation that the boundary between the State of Texas and the State of Oklahoma is the "South Cut Bank" of the Red River. Furthermore, the State of Oklahoma has never attempted to exercise jurisdiction over the Denison Dam Generating Station nor has it taken a position as to whether Texas or the Federal Energy Regulatory Commission (FERC) should regulate the Generating Station or its customers.

Therefore, the State of Oklahoma has no specific objection to or desire of Texas Power and Light Company's intervention in support of the State of Texas. However, to aid the Special Master in deciding whether to grant the

intervention requested by Texas Power and Light Company, the State of Oklahoma hereby submits the following views and authorities.

ANALYSIS

The question of intervention in original actions has been addressed several times by the Supreme Court. In *Kentucky* v. *Indiana*, 281 U.S. 163, 50 S.Ct. 275, 74 L.Ed. 784 (1929), a private citizen sought intervention in an original action between states concerning a contractual matter. The Court pointed out that,

> "A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens. The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters and taxpayers, merely as such, of either state, without a showing of any further and proper interest have no separate individual right to contest in such a suit the position taken by the state itself." (281 U.S., at 173)

Thus, it appears that a state represents the interests of all its citizens in original jurisdiction cases. This result is further emphasized by the Court in *New Jersey* v. *New York*, 345 U.S. 369, 73 S.Ct. 689, 97 L.Ed. 1081 (1953). In that case, the City of Philadelphia filed a motion for leave to intervene. The Court, after noting that the Commonwealth of Pennsylvania had been granted leave to intervene, stated:

> "Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest

in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." (345 U.S. 373, 374)

Again, where a state is a party, it is presumed to be representing its inhabitants. However, there also appears to be an exception to this general rule. In *Oklahoma* v. *Texas*, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771 (1922), an original action concerning the southern boundary of Oklahoma along the Red River, the Court allowed intervention by private parties. Private parties who had property interests and oil and gas interests in the land lying under the Red River were permitted intervention since the tracts and funds were in a receiver's possession and under the Suprme Court's exclusive control and thus no other court could lawfully disturb or interfere with that possession.

The interests asserted by the states were not necessarily the same interests being asserted by the private parties. The Court held that claims to property in possession of a court may be dealt with as ancillary to the suit wherein possession is taken even though independent suits to enforce the claims could not be entertained in that court (258 U.S., at 581).

Thus, where a private party clearly asserts rights different or adverse to the state's position in the action, intervention may be allowed. The intervention, if it is to be allowed in a case, is a matter of discretion with the Court. A more recent Supreme Court decision acknowledging private party intervention, yet disallowing it in the case, is *Utah* v. *United States*, 394 U.S. 89, 89 S.Ct. 761, 22 L.Ed.2d 99 (1969). Lands under the Great Salt Lake were involved

in the original action. The State of Utah claimed ownership of lands in the lake's bed. The United States claimed title to the lands exposed due to reliction, this being part of the land also claimed by Utah. The private party also asserted a claim to certain of the relicted lands and sought intervention as a party defendant. The United States and the State of Utah entered into a stipulation limiting the issues in the case and the Supreme Court held that presence of private landowners was therefore neither necessary or appropriate. The Court noted that absent the stipulation, the private intervenor's motion for leave to intervene would have had a more substantial basis. Having no duty to allow the intervention for the purposes of raising issues that were not raised by the sovereigns concerned, the Court denied the leave to intervene. The Court reaffirmed that the question of private party intervention was one of discretion to be exercised in light of the policy of having the original jurisdiction of the Supreme Court invoked only sparingly.

A few concrete principles thus emerge from the abovementioned cases. First, a state in an original action in the Supreme Court presumably represents its citizens and creatures and their interests in the suit. Second, prior to allowing a private party to intervene, the private party must show some compelling interest that is not within the interests of all other citizens and creatures of the state. Additionally, the sovereigns may, by stipulation, limit the issues to be heard by the Court, and thus preclude the private party from raising additional issues by way of intervention. Lastly, when a private party asserts an interest which may be adversely affected by the proceeding

continuing without him, the Court may grant the intervention through the sound exercise of its discretion.

In the instant case, Texas Power and Light Company, in their motion for leave to intervene, states that they agree with the State of Texas that the dam construction did not change the boundary between Texas and Oklahoma. (Intervenor Motion, at 3). The State of Texas, in their motion for leave to file complaint, in effect limits the issue in this Court to a reestablishment of the boundary as it existed prior to the dam being constructed. In their prayer for relief they request,

> "The State of Texas prays that a decree be entered declaring the boundary between the State of Texas and the State of Oklahoma . . . [and] that the State of Texas be declared to be the sovereign over said area. . . ." (Texas Complaint, at 4)

The State of Oklahoma, in its answer filed in April 1980, requests a decree declaring and determining the boundary between the State of Oklahoma and the State of Texas and that the State of Oklahoma be entitled to exercise jurisdiction over such area to the south cut bank of the Red River.

Thus, it appears that the sovereigns in the litigation have limited the lawsuit to the issue of reestablishing a prior-determined boundary line. This situation is analagous to the situation in *Utah* v. *United States,* supra, where private party intervention was withheld.

However, for the Court's further information, an alternative to intervention does exist that would allow some participation on behalf of Texas Power and Light Company

should this Court desire such participation. Rule 42 of the Supreme Court Rules of Practice found in 28 U.S.C. provides for the filing of briefs as an *amicus curiae*. Specifically, Rule 42, subsection (2), states that the Court can issue an order allowing an individual to file such a brief or a brief may be presented after having obtained the consent of all the parties. The question of filing an *amicus curiae* brief would, in this case, need not be addressed until some decision on the intervention motion has been made by this Court.

In any event, the State of Oklahoma submits that should this Court, through the sound exercise of its discretion, determine that the Texas Power and Light Company has asserted such a compelling interest so as to differ from the citizens, voters, creatures or taxpayers of the State of Texas, the grant of intervention would be proper and without objection by the State of Oklahoma.

Respectfully submitted,

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October, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of October, 1980, true and correct copies of the foregoing were served by placing same in the U. S. Mail, postage fully prepaid, and addressed to the following:

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All parties required to be served have been served.

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